

SIGNED.



Dated: May 27, 2010

Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re)	Chapter 11
)	
DAVID J. ZOOK,)	CASE NO. 2:09-bk-05415-RJH
)	
Debtor.)	
)	
DAVID J. ZOOK, Debtor/Debtor-in-)	ADVERSARY NO. 2:09-ap-00621-RJH
Possession,)	
)	
Plaintiff,)	
)	
v.)	
)	MEMORANDUM DECISION RE
WELLS FARGO BANK, N.A., a national)	EFFECTIVE DATE FOR AVOIDANCE
banking association,)	OF STRIPPED OFF LIENS
)	
Defendant.)	
)	

The parties are in agreement that, at least as of the petition date, there was no value to extend to Wells Fargo's two second liens, one on the 53rd Street property and the other on the 68th Place property. And they agree that if those values are used, then the second liens may be "stripped off" by the Chapter 11 plan in this case pursuant to Bankruptcy Code §§ 506(a) & (d) and 1123(b)(5). They disagree, however, as to what would be the effective date of the avoidance of those liens if such a plan is confirmed and consummated and, depending on the appropriate answer to that issue, what is the proper date for a valuation of the property.

The Debtor relies primarily on Code § 1141 in support of his contention that the lien avoidance would occur either upon the confirmation of the plan or upon its effective date (which is usually no more than 14 or 30 days after entry of the confirmation order). The Bank argues from analogy to Code § 1325(a)(5)(B) that the avoidance should not occur until the

1 individual Chapter 11 debtor receives his discharge, which under § 1141(d)(5) is ordinarily not
2 until the individual debtor completes all payments under the plan. The Bank also argues that the
3 lien should remain in effect until the discharge in order to protect the Bank's right to
4 reinstatement of the lien pursuant to Code § 349(b)(1)(C) in the event this case is dismissed
5 before entry of a discharge, because otherwise the Debtor could sell or further encumber the
6 property prior to the reinstatement of the Bank's lien.

7 The Bank makes a good point that avoidance of the lien at confirmation creates a
8 risk that the Bank could not be fully protected by reinstatement of the lien pursuant to §
9 349(b)(1)(C) in the event of dismissal prior to discharge. But the plain language of the Code §§
10 1141(a), (b) & (c) makes clear that the modification of a lien pursuant to a Chapter 11 plan
11 occurs upon confirmation and is not dependent upon the making of all payments under the plan
12 or the entry of a discharge. Moreover, although BAPCPA changed the rule for Chapter 13 cases
13 by adding § 1325(a)(5)(B),¹ no similar change was made for Chapter 11. This distinction is
14 particularly significant given that BAPCPA included specific provisions governing those aspects
15 of Chapter 11 that were intended to be made analogous to Chapter 13 when the Chapter 11
16 debtor is an individual, most notably in § 1129(a)(15) and in § 1129(b)(2)(B)(ii).

17 At least in this Circuit, the law is clear that confirmation of a Chapter 11 plan
18 replaces all prepetition obligations and liens with the terms of a confirmed plan, effective
19 immediately upon confirmation.² And because this modification of prepetition liens occurs
20 pursuant to confirmation of the plan, the lien avoidance occurs pursuant to § 1141 rather than
21 pursuant to § 506(d). Although this issue is not ripe for decision on the present facts and
22 circumstances, this would also seem to imply that § 349 does not reinstate a lien that has been
23

24 ¹The Court notes there are also arguments as to whether a lien strip pursuant to a plan might
25 provide a basis for avoidance that is distinct from a purely § 506(d) avoidance, which might therefore
26 render § 349(b)(1)(C) inapplicable, and whether a Chapter 13 debtor might be entitled to strip off a lien
27 even if the debtor is not entitled to a discharge. *Compare In re Burnett*, 2010 W.L. 1507947 (Bankr.
S.D. Cal. April 2, 2010), with *In re Picht*, 2010 W.L. 1768238 (10th Cir. BAP May 4, 2010). Given the
resolution of this issue based on the language of § 1141, neither of these issues need be
resolved here.

28 ²*Hillis Motors, Inc. v. Hawaii Auto Dealers' Association*, 997 F.2d 581 (9th Cir. 1993).

1 avoided or modified as a result of confirmation of the plan, as at least one district court has
2 concluded.³

3 Finally, this determination also resolves what is the appropriate date for
4 determining the value of the property. It is the date of the confirmation hearing, as the Ninth
5 Circuit has previously held with respect to Chapter 11 cases involving corporate debtors.⁴

6 The Debtor is therefore entitled to partial summary judgment on Counts 1 and 2 of
7 its complaint, to the extent set forth in this memorandum decision. If this resolves the entirety
8 of the complaint, Debtor's counsel may upload an appropriate form of final judgment. If this
9 does not resolve the entirety of the complaint, this resolution is interlocutory and therefore this
10 memorandum decision will suffice until final judgment is appropriate.

11 DATED AND SIGNED ABOVE

12 Copy of the foregoing e-mailed
13 this 27th day of May, 2010, to:

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26 ³*United States v. Ramirez*, 291 B.R. 386, 392 (N.D. Texas 2002).

27 ⁴*Liberty Nat'l. Entr. v. Ambanc LaMesa Ltd. Ptshp.*, 115 F.3d 650 (9th Cir. 1997). *Accord, In re*
28 *T-H New Orleans Ltd. Ptshp.*, 116 F.3d 790 (5th Cir. 1997). *But see In re Stembridge*, 394 F.3d 383 (5th
Cir. 2004) (valuation of a vehicle in a chapter 13 case).

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